Supreme Court of the United States

OCTOBER TERM, 1945

No. 505.

GEORGE C. HOLMBERG, FRANK C. BALL, CARL J. EASTERBERG, GEORGE F. HARDIE and PAT B. MORRIS, on behalf of themselves and all other creditors of the Southern Minnesota Joint Stock Land Bank of Minneapolis,

Petitioners and Appellees below,

vs.

CHARLES ARMBRECHT and GILBERT MILLER, BARBARA RICHARDS MICHEL, MURIEL RICHARDS PERSHING and DOROTHY RICHARDS HIRSHON, as Executors under the Last Will and Testament of JULES S. BACHE, deceased,

Respondents and Appellants below.

BRIEF FOR DEFENDANTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

CHESTER ROHRLICH,
Counsel for Defendants.

EDGAR M. SOUZA,
STANLEY GOLDSTEIN,
ALVIN D. LURIE,
of Counsel.

INDEX

CASES CITED

STATUTES CITED

Supreme Court of the United States

OCTOBER TERM, 1945

No. .....

GEORGE C. HOLMBERG, FRANK C. BALL, CARL J. EASTERBERG, GEORGE F. HARDIE and PAT B. MORRIS, on behalf of themselves and all other creditors of the Southern Minnesota Joint Stock Land Bank of Minneapolis,

Petitioners and Appellees below,

vs.

CHARLES ARMBRECHT and GILBERT MILLER, BARBARA RICHARDS MICHEL, MURIEL RICHARDS PERSHING and DOROTHY RICHARDS HIRSHON, as Executors under the Last Will and Testament of JULES S. BACHE, deceased,

Respondents and Appellants below.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR DEFENDANTS IN OPPOSITION

Opinions Below

The opinion of the United States District Court for the Southern District of New York (R. 99) was rendered on November 1, 1944. The opinion of the United States Circuit Court of Appeals for the Second Circuit (R. 113) was rendered on July 13, 1945. Official citation is not yet available.

Jurisdiction

The judgment herein was entered on July 13, 1945 (R. 122). No petition for rehearing was filed. The petition for a writ of certiorari was filed on October 12, 1945. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Questions Presented

1. Did the Circuit Court of Appeals for the Second Circuit err in its conclusion that a federal court in equity is bound by the state ten-year statute of limitations which would be applied if the present question were presented to a New York State court?

2. Assuming that the doctrine of laches is applicable, should not the District Judge have found that the petitioners were guilty of laches?

Statement

The petitioners and appellees below, as creditors of the Southern Minnesota Joint Stock Land Bank of Minneapolis (hereinafter called the "Bank"), sued in November, 1943, to recover an assessment against Charles Armbrecht and Jules S. Bache as shareholders of the Bank to the extent of 100% of the par value of their shares, pursuant to Title 12, Chapter 7, Section 812,* U. S. Code.

---

* This section reads as follows:

"§ 812. *Individual liability of shareholders.* Shareholders of every joint-stock land bank organized under this chapter shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of such bank to the extent of the amount of stock owned by them at the par value thereof, in addition to the amount paid on and represented by their shares."

The Bank failed on May 2, 1932. Armbrecht was then the record owner and Bache was the beneficial owner of 100 shares of the Bank (R. 19). This action was commenced on November 17, 1943, that is, more than eleven years and six months after the cause of action accrued (R. 1). Jules S. Bache died on March 24, 1944. Gilbert Miller, Barbara Richards Michel, Muriel Richards Pershing and Dorothy Richards Hirshon, as executors under the will of Jules S. Bache, were substituted for him as parties defendant (R. 18).

In January, 1944, this action was consolidated with another action (hereinafter called "Action No. 1") commenced by these petitioners on May 2, 1942, in respect of the same shares and for similar relief against Charles Armbrecht and the brokerage firm of J. S. Bache & Co. The only defendant served was Morton F. Stern, a partner of said firm. The alleged service of the summons and complaint on Armbrecht was quashed by the District Court in October, 1943 (R. 11, 44). Action No. 1 proceeded on the theory that the firm of J. S. Bache & Co. was the beneficial owner of said shares. This action, however, proceeds upon the theory that Jules S. Bache was the beneficial owner of the shares, which was admitted by the answer (R. 14). The defendants pleaded the New York statute of limitations and laches in separate defenses (R. 16).

The two actions were tried together. In Action No. 1 the complaint as to Stern was dismissed on the ground that the firm of J. S. Bache & Co. had no interest in the shares at the time the Bank failed (R. 2). No appeal was taken from such dismissal.

The shares in question (transferred from shares standing in the name of J. S. Bache & Co. from 1924 and 1925) were issued at the request of J. S. Bache & Co. in the name of its nominee Armbrecht on January 20, 1928 (R. 80, 81, 90-98). It appeared from the only available records of J. S. Bache & Co., earlier records having been destroyed, that these shares were carried in the individual margin or

long account of Jules S. Bache, as security therefor, between October, 1931 and January, 1933 (Finding of Fact 2, R. 100, 101).

In proceedings in the District of Minnesota, it was held on April 20, 1935, that an assessment of 100% against the Bank's stockholders was necessary. Thereafter and prior to March, 1936, proceedings were instituted in New York, resulting in the appointment of Irving S. Friede as Ancillary Receiver of the Bank, to enforce the decree of the Minnesota Court against stockholders of the Bank resident in New York (R. 33, 35). Friede, as such Receiver, sued Armbrecht, who was served with process in August, 1936, but before judgment was entered against him, Friede's appointment as Ancillary Receiver was nullified (R. 37). In April, 1937, in a new bill of complaint Armbrecht was again named as one of many defendants, but he was never served (R. 38), although he was then living in the Bronx and had been since 1905 (R. 77) and was a weekly visitor at the office of J. S. Bache & Co., then at 42 Broadway, New York City (R. 71).

For more than four years, viz., from August, 1937, until December, 1941, or January, 1942, neither petitioners nor their counsel did anything to enforce the liability of defendant Armbrecht (R. 52). Then, as stated above, Action No. 1 was commenced on May 2, 1942. While petitioners' counsel stated that Action No. 1 against J. S. Bache & Co. was only for the purpose of discovery and inspection (R. 62) the claim was pressed to the very end, and this also despite the fact that the Bank's records showed that each certificate of stock (Defts.' Exs. A, B and C, 90-98) which had been surrendered to the Bank by J. S. Bache & Co. in 1928 for transfer to the name of Charles Armbrecht had stamped thereon a notation that the transfer was made to Armbrecht's name solely to complete a purchase for their customer and that J. S. Bache & Co. had no ownership or interest therein (R. 92, 95, 98).

In September, 1942, defendant Stern, during his examination before trial by petitioners' counsel, testified that

the firm of J. S. Bache & Co. had no ownership, beneficial or direct, in the shares and that Jules S. Bache was the beneficial owner thereof at the time the Bank failed. No attempt was made, however, to have Jules S. Bache served as a party defendant until the instant action was started in November, 1943, viz., thirteen and one-half months after Stern so testified, and approximately eleven years and six months after the cause of action arose (R. 58).

Contrary to petitioners' assertion, there is not one iota of evidence in the record that Armbrecht and Bache, or either of them, at any time did or omitted to do any act or thing, fraudulent or otherwise, to prevent petitioners from instituting suit, nor is there a finding of fact that defendants were guilty of inequitable conduct.

The District Court rendered judgment in favor of petitioners and against defendants for $10,000. On appeal to the United States Circuit Court of Appeals for the Second Circuit, the judgment was reversed (R. 113-121). The Circuit Court, relying upon *Guaranty Trust Company of New York* v. *York*, decided by the Supreme Court of the United States June 18, 1945, and *Russell* v. *Todd*, 309 U. S. 280, held that the ten-year New York State statute of limitations (Section 53 of the Civil Practice Act) was binding upon a federal court sitting in equity, and that an action brought over eleven and one-half years after accrual of the cause of action could not succeed.

Summary of Argument

Point I

The decision of the Circuit Court that petitioners' claim is barred by the New York statute of limitations is not in conflict with rulings of the Supreme Court. On the contrary, it is in accord with its expressed view and with the rule of the majority of federal decisions that federal courts of equity must apply state statutes of limitations

even in actions to enforce rights arising under federal statutes, provided there is no conflict with the federal statute involved.

Adherence to this rule is required equally with respect to cases arising under a federal statute and diversity cases, both for the sake of uniformity in the enforcement of litigants' rights and consistency in the application of *Erie R. Co.* v. *Tompkins*.

Contrary to the assertion of petitioners, there was no finding by the trial court that defendants were guilty of inequitable conduct, but even had there been such a finding, the above rule applies.

Point II

Assuming the doctrine of laches is applicable, the trial court erred in finding that petitioners were not guilty of laches. On the contrary the evidence showed unreasonable delay on the part of petitioners, to the prejudice of defendants, and the trial court should have so found.

ARGUMENT

POINT I

The New York Ten-Year Statute of Limitations is conclusive herein.

Petitioners assign as reasons for the issuance of a writ of certiorari to the Circuit Court error on an important question of law and probable conflict with applicable decisions of this Court. They contend that the applicable state statute of limitations is not binding on the federal court dealing with rights arising under a federal statute. The rejection of this contention by the lower court is so clearly correct that a review by this Court is, we submit, not warranted.

(a) The decision below is correct.

The Supreme Court has unmistakably expressed its view that the mere fact that an action arises under a federal statute does not warrant the violence to uniform procedure that is implicit in petitioners' contention.

As stated by the Circuit Court in its opinion (R. 120):

> "In enforcing legal rights under a federal statute state limitations statutes have always been applied as in proceedings to enforce private rights under the anti-trust laws, *Chattanooga Foundry & Pipe Works* v. *City of Atlanta*, 203 U. S. 390, Holmes, J.; *cf. Momand* v. *Universal Film Exchange*, D. C. Mass., 43 F. Supp. 996, 1008, Wyzanski, J.; *Hansen Packing Co.* v. *Swift & Co.*, D. C. S. D. N. Y., 27 F. Supp. 364, Galston, J.; or for the infringement of patents, *Campbell* v. *City of Haverhill*, 155 U. S. 609; or for the statutory liability of a shareholder in a national bank, *McDonald* v. *Thompson*, 184 U. S. 71; *Rawlings* v. *Ray*, 312 U. S. 96."*

These decisions render meaningless any distinction that might be asserted, predicated upon the ground that the rights here involved arose under a federal statute, and the decision in *Guaranty Trust Co.* v. *York* further renders meaningless any distinction based upon the fact that the action arises in equity rather than law. This Court has expressed its views with respect to a situation where there was the concurrence of a federally created right with equity in *Russell* v. *Todd*, 309 U. S. 280, 293, where the same statute as is involved here, was the basis of the action. This Court there stated:

> "We take it that in the absence of a controlling act of congress federal courts of equity, in enforcing rights arising under statutes of the United States, will without reference to the Rules of Decision Act adopt and

---

*See also: *Guaranty Trust Company of New York* v. *York*, decided by the Supreme Court of the United States June 18, 1945, p. 12, printed copy of opinion, citing *Godden* v. *Kimmell*, 99 U. S. 201; *Alsop* v. *Riker*, 155 U. S. 448; *Benedict* v. *City of New York*, 250 U. S. 321, 327-8.

apply local statutes of limitations which are applied to like causes of action by the state courts. *Cf. Mason v. United States*, 260 U. S. 545; *Jackson County v. United States*, 308 U. S. 343."

Russell v. *Todd* was followed by the United States Circuit Court of Appeals for the Eighth Circuit, in *Ball et al.* v. *Gibbs*, 118 Fed. (2d) 958 (April 9, 1941), a case also involving the same statute as here and where the facts are strikingly similar to those in the present action. See also *Roos v. Texas Co.* (5th Circuit), 126 Fed. (2d) 767, and *Overfield* v. *Pennroad Corp.* (3rd Circuit), 146 Fed. (2d) 889.

The policy running through all of these cases is uniformity—a policy as essential in the adjudication of federal rights as it is in state rights. As a practical matter, uniformity on questions of the appropriate periods of limitation, said in *Guaranty Trust Co.* v. *York* to be best served in diversity cases by adherence to applicable state statutes of limitations, can only be attained in cases under a federal statute by similar adherence to state statutes of limitations.

Petitioners argue that uniformity in the latter cases can only be accomplished by a separate federal rule of laches. It is obvious, however, that the argument is not applicable to the problem of appropriate periods of limitation. Far from creating uniformity, a federal rule of laches would reinstate the chaos and confusion that the decision by this Court in the *York* case has set to rest. Under the laches rule, litigants' rights would be subject to innumerable variations, depending upon the particular instincts of the trial judge. For the sake of uniformity, therefore, it would be infinitely more desirable that the applicable state period of limitations be made conclusive in every case, placing all litigants on an equal footing in each state.

This is particularly true in view of the holding of the *York* case that limitations go to the substantive rights of the parties. A contrary result would give rise to the anomaly in the federal system of diverse rules of federal prac-

tice with respect to the conclusiveness of state substantive law in a federal court, echoing the confusion of the period prior to *Erie R. Co.* v. *Tompkins*.

Petitioners, we submit, cannot successfully dispute the logic of this argument, nor have they attempted to deny the force of the cases discussed above which bear it out in result. They take issue only with the Circuit Court's reliance on *Guaranty Trust Co.* v. *York* in support of this result. They do not, and could not, take the position that the *York* case is contrary to the above authorities. Their position is, rather, that it has been extended unwarrantedly by the Circuit Court, in that it only expressed the rule to be applied where the federal court is sitting because of diversity, whereas, so petitioners say, the case at bar presents the entirely different situation of a federal court sitting because the claim is created by federal statute. This distinction is non-existent, because here the jurisdiction of the federal court rests both on the fact that the action was one to enforce a right created by federal statute and the fact that the matter in controversy is between citizens of different states (R. 4). In fact, as stated by the Circuit Court, "the assessment authorized by this statute is enforceable in state courts", citing *Friede* v. *Jennings*, 121 Conn. 220, 184 A. 369; *Friede* v. *Sprout*, 294 Mass. 512, 2 N. E. 2d 549; *In re Christopher's Estate*, Ohio App., 35 N. E. 2d 454 (R. 120-121).

Petitioners rest heavily on the fact that this Court in the decision of the *York* case expressly ruled out of its considerations questions relevant to the disposition of a claim based on federal law. It seems hardly necessary to point out that, in so doing, this Court did not impugn the authorities discussed above. What is more significant, this Court, in rendering its decision in the *York* case, was not placing to one side *all* cases involving claims based on federal law, but only those cases where the federal statute in issue contained a period of limitation inconsistent with that of the

state law, as the Circuit Court well recognized.* The rule of the latter cases would, of course, be irrelevant in deciding a matter such as *Guaranty Trust Co.* v. *York;* but as the litigation at bar involves no conflicting federal statute of limitation, it is not distinguishable from the *York* case as including questions of the type which this Court expressly put to one side.

(b) State statutes of limitations may not be disregarded whenever federal courts think that the result of following them may be inequitable.

While conceding that ordinarily federal courts sitting in equity will apply state statutes of limitations, at least by analogy, petitioners argue that where defendants were found guilty of inequitable conduct, the rule that laches will not be invoked against the plaintiffs until the defendants are discovered should apply. As we hereafter point out, there was no proof of any fraud and no finding below that the defendants here were guilty of inequitable conduct, nor could there be from the record. But more than that, implicit in petitioners' statement is the argument that in certain cases a federal court can vary from the state statue. If there ever was a proposition that a federal equity court could ignore a state statute of limitations because of the inequitable result, due if you will to a defendant's inequitable conduct, it is, as the Court below recognized, the law no longer. In the *York* case, this Court noted that "there was talk of freedom of equity from such state statutes of limitations", but remarked that "before the true source of law that is applied by the federal courts

---

* The cases cited were: *Board of Com'rs* v. *United States*, 308 U. S. 343; *Deitrick* v. *Greaney*, 309 U. S. 190; *D'Oench, Duhme & Co.* v. *Federal Deposit Ins. Corp.*, 315 U. S. 447; *Clearfield Trust Co.* v. *United States*, 318 U. S. 363; *O'Brien* v. *Western Union Telegraph Co.*, 1 Cir., 113 F. (2d) 539. As stated by Judge Clark in his opinion below (R. 118):

> "These cases, based on federal enactments, state no more than the obvious principle that a rule of state law will be disregarded by a federal court, when inconsistent with the federal statute governing the case before it."

under diversity jurisdiction was fully explored, some things were said that would not now be said". This loose talk, continued this Court, merely reflects "notions that have been replaced by a sharper analysis". Noting that there was one old case, *Kirby* v. *Lake Shore & M. S. Co.*, 120 U. S. 130, in which the Supreme Court did disregard a state statute of limitations when the court deemed it inequitable to apply it, this Court decided in the *York* case that the *Kirby* case "needs to be rejected", citing with approval the following quotation from the dissenting opinion of Judge Augustus N. Hand below:

> "In my opinion it would be a mischievous practice to disregard state statutes of limitations whenever federal courts think that the result of adopting them may be inequitable."

The only authority offered by petitioners in support of their contention is a statement of the late Judge Woolsey in *Holmberg* v. *Anchell*, 24 Fed. Supp. 594, at 603. There, however, the facts showed a deliberate and fraudulent intent on the part of certain defendants to avoid liability by hiding behind a corporation which they had created for the purpose. In a later case, however, *Partridge* v. *Ainley*, 28 Fed. Supp. 472, at 476—also an action against stockholders of a joint stock land bank—Judge Woolsey expressed his opinion that a federal court in a cause of equitable cognizance, sitting in a state where there is a statute of limitations applicable to equity actions, could no longer apply the doctrine of laches after the enactment of the new rules of federal procedure, in effect September 16, 1938.

Furthermore, petitioners' rest their contention upon the assertion that the trial court "found as a fact that the defendants were found guilty of inequitable conduct" (Petitioners' Brief, p. 7). There is no such finding in the record and none could have been made from the evidence. Although the trial ~~court~~ judge did by inference in his decision, without a finding of fact, seek to create the im-

pression that Bache was guilty of inequitable conduct, he based his statements on his erroneous finding that the stock was placed by Bache in Armbrecht's name in 1931, whereas the undisputed documentary proof in the record shows it was placed in Armbrecht's name by J. S. Bache & Co. in January, 1928, at a time when there was no reason to suspect the imminent possibility of double liability. The trial court found that J. S. Bache & Co. acted only as broker, both in securing the issuance of the stock to Armbrecht and as pledgee of the stock in maintaining a margin account for Jules S. Bache (R. 101), and at the trial expressed itself as thoroughly familiar with the well-established Wall Street custom of holding stock as collateral in the name of a nominee (R. 78-79). Defendants were under no duty to have the stock registered in Bache's name. The rule is concisely stated by the Court of Appeals in *Broderick* v. *Aaron*, 264 N. Y. 368 (377). "There is no duty upon a buyer to register a transfer of stock upon the corporate books, and no obligation arises upon equitable grounds for failure to make such a transfer." The trial court recognized this as sound law at the trial, commenting thereon as follows (R. 68):

> "That is what I think would be sound law. There must be any number of reasons that a man can give readily for carrying stock in a name other than his own."

The trial court, however, in its opinion argues from its said erroneous finding as to date, that why Bache put the stock in Armbrecht's name is immaterial; that when he used Armbrecht's name as a dummy for his own purpose Bache forsook any claim to later damage for failure to recognize him as a defendant earlier and that claim now comes with bad grace, and that Armbrecht, because he did nothing to meet his alleged liability or to pass it on to the shoulders of the beneficial owner, even though that owner was in some sense his patron, indicates, if anything, that he willingly lent himself to Bache's escape.

All these inferences and assumptions must fall in the light of the indisputable record that the stock had been in Armbrecht's name for several years before the record shows Bache owned it. Bache could not, of course, escape liability because the stock was in a name other than his own, as the trial court well realized (R. 68); yet he wandered off into the realm of assumption and inferred wrongdoing where the record showed none existed. We submit, therefore, that on the record there is lacking any evidence of inequitable conduct on the part of Bache or Armbrecht to warrant this Court in applying the rule of laches contended for by petitioners.

POINT II

Assuming that the doctrine of laches is applicable, the trial court should have found that the petitioners were guilty of laches.

In view of the conclusion of the Circuit Court that the New York statute of limitations barred the action, that Court did not decide the question of the laches of the petitioners (R. 117). It becomes important on this application only if this Court be inclined to rule that a writ of certiorari should be granted.

Briefly stated we contend that petitioners' unexplained delay in proceeding against Armbrecht from August, 1937, to January, 1942, and the delay for thirteen months after September, 1942, to proceed against Jules S. Bache was wholly unwarranted. No explanation for this long delay was given or offered at the trial and no attempt was made in any respect to excuse it.

Petitioners' contention below that it necessarily took them more than eleven years to find out that Jules S. Bache was the beneficial owner of the stock is completely without merit, for reasons that are unnecessary to state at this time.

In any event, there is no excuse in the record for petitioners' failure to proceed against Jules S. Bache for more than thirteen months after they learned in September, 1942, that he was the beneficial owner of the stock.

This delay was prejudicial to the defendants. The complaint herein did not contain all the allegations necessary in an action for fraud and deceit and it therefore was apparent under the decisions that based on this theory the petitioners could not succeed. Bache, therefore, had every reason to believe and to rely on the fact that there was nothing for him to do except to await the trial.

No amended complaint was ever served and the theory of the complaint was never changed until the trial, several months after Bache's death. Then the charge that Jules S. Bache had been guilty of fraud, upon which the complaint was framed, was dropped and the case was tried upon the theory that Bache aided by Armbrecht's failure to meet his liability by some obligatory affirmative act, the nature of which is not stated, had been guilty of inequitable conduct by continuing after acquiring the stock to hold it in his margin account in the name of Armbrecht to avoid detection as the real owner.

It is a well established principle that the rule of laches is especially to be enforced where the right to relief is based on the alleged fraud of a person who had died (*Naylor* v. *Foreman-Blades Lumber Co.*, 230 Fed. 658; *Hammond* v. *Hopkins*, 143 U. S. 234). The rule generally applies in cases where the person charged with inequitable conduct died before the institution of the suit. But we can find no reason why the same rule should not apply in the present case in which the contention that Bache was guilty not of fraud but of inequitable conduct was for the first time advanced after he was dead. His death, therefore, coming as it did so soon after the case was at issue, prevented the defendants from meeting the claim that his conduct was inequitable in that they were unable to adduce any proof to meet a claim never advanced while he was alive.

Owing to the loss of records due to petitioner's long lapse of time in bringing the action, defendants were also prevented from establishing when Jules S. Bache acquired the stock. The importance that the trial court below placed upon the time when Jules S. Bache acquired the stock is shown by the significance the trial court attached to the erroneous findings that he acquired it in 1931 and then caused it to be placed in Armbrecht's name. J. S. Bache & Co. had in 1937 or 1938 destroyed all its records of transactions prior to 1931 (R. 74). See *Order of Railroad Telegraphers* v. *Railway Express Agency, Inc.*, 321 U. S. 342, at 348-49.

Defendants were thus prejudiced by the long delay and the trial court erred in not finding petitioners guilty of laches.

CONCLUSION

The decision below is correct and no conflict exists. We respectfully submit that the petition for a writ of certiorari should be denied.

Dated, New York, November 7, 1945.

Respectfully submitted,

CHESTER ROHRLICH,
Counsel for Defendants.

EDGAR M. SOUZA,
STANLEY GOLDSTEIN,
ALVIN D. LURIE,
of Counsel.